COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

CASE OF B.B. v. THE UNITED KINGDOM

(Application no. 53760/00)

JUDGMENT

STRASBOURG

10 February 2004

FINAL

07/07/2004

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of B.B. v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr M. PELLONPÄÄ, *President*,
Sir Nicolas BRATZA,
Mr J. CASADEVALL,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr J. BORREGO BORREGO,
Mrs E. FURA-SANDSTRÖM, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 20 January 2004,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 53760/00) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a national of the United Kingdom, Mr B.B. ("the applicant"), on 9 August 1998. The President of the Chamber acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The United Kingdom Government ("the Government") were represented by their Agent, Ms Helen Mulvein, of the Foreign and Commonwealth Office.

3. The applicant alleged, in particular, that his arrest and charge according to legislation which set down different ages of consent for homosexual and heterosexual acts constituted discrimination on the grounds of sexual orientation and that the decision to prosecute him but not the sixteen-year old boy constituted discrimination on the grounds of age.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

7. By a decision of 27 May 2003 the Court declared the above-described complaints admissible and declared the remainder of the application inadmissible.

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1957 and lives in London.

10. The relevant facts of the case, as submitted by the parties, may be summarised as follows. The events described below took place between January 1998 and February 1999.

11. The applicant contacted the police after he was attacked by a young man with whom he had had homosexual relations. He was arrested for allegedly engaging in buggery with a young man aged 16 years of age contrary to section 12(1) and schedule 2 of the Sexual Offences Act 1956. The applicant underwent a medical examination with his consent during which samples were taken and his residence was searched by police. He was released on police bail the following day and was subsequently formally charged.

12. The applicant attended before the Magistrates' Court on four occasions and each time he was bailed to re-appear. During this period, the applicant wrote to the Crown Prosecution Service (CPS) and other government officials stating that the criminal proceedings against him violated his human rights, citing the case of *Sutherland v. the United Kingdom* (no. 25186/94, Commission's report of 1 July 1997, unpublished).

13. The applicant subsequently requested leave to apply for judicial review of the CPS decision to prosecute him but this application was refused. His renewed application was later rejected by the High Court. Following a hearing at the Magistrates' Court, the applicant was committed for trial at the Central Criminal Court. He appeared before the Central Criminal Court for a plea and directions hearing and for a hearing on various matters including his request for the trial to be postponed in order to allow him more time to prepare.

14. The CPS later advised the applicant by letter that it had decided not to proceed with the case against him and that he should accordingly attend the Central Criminal Court on a particular date. On that date he was formally acquitted by that court. The trial judge asked the applicant if he would like to make a claim for costs but, following a brief discussion, the

applicant decided not to make any claim on the grounds that, in his view, the CPS were "quibbling" over the amount to be awarded.

II. RELEVANT DOMESTIC LAW

A. The law applicable at the time of the relevant events

15. Section 12(1) of the Sexual Offences Act 1956 ("the 1956 Act") made it an offence for a person to commit buggery with another person. Pursuant to Section 13 of the 1956 Act it was an offence for a man to commit an act of "gross indecency" with another man, whether in public or private.

16. Section 14(1) of the 1956 Act made it an offence for a person to commit indecent assault on a woman. Section 14(2) of the 1956 Act provided that a girl under the age of sixteen years of age could not give any consent which would prevent an act being an assault for the purposes of the section.

17. Section 1 of the Sexual Offences Act 1967 ("the 1967 Act") provided, *inter alia*, as follows:

> "(1) Notwithstanding any statutory or common law provision ... a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of twenty-one years. ...
>
> (7) For the purposes of this section a man shall be treated as doing a homosexual act if, and only if, he commits buggery with another man or commits an act of gross indecency with another man or is a party to the commission by a man of such an act ..."

18. The subsequent Criminal Justice and Public Order Act 1994 ("the 1994 Act") replaced "twenty-one years" in the 1967 Act with "eighteen years".

B. The Sexual Offences (Amendment) Act 2000 ("the 2000 Act")

19. This Act entered into force on 8 January 2001. Section 1 reads:

> "(1) In the Sexual Offences Act 1956-
>
> (a) in subsections (1A) and (1C) of section 12 (buggery); and
>
> (b) in sub-paragraphs (a) and (b) of paragraph 16 (indecency between men etc.) of Schedule 2 (punishments etc.),
>
> for the word 'eighteen' there shall be substituted the word 'sixteen'."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

20. The applicant complained that he was discriminated against on the grounds of his sexual orientation by the existence of, and by his prosecution under, legislation that made it a criminal offence to engage in homosexual activities with men under 18 years of age whereas the age of consent for hetereosexual activities was fixed at 16 years of age. He also complained that he was discriminated against on the grounds of age by the decision to prosecute him while failing to prosecute the sixteen-year-old boy who would technically have been as guilty as he was of the same offence.

Article 8 reads as follows:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14, in so far as relevant, provides as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, ... or other status."

A. The parties' submissions

21. The applicant made extensive submissions including that the CPS and the domestic courts ignored his repeated warnings that the criminal proceedings against him violated his human rights and that his prosecution was contrary to the Commission's approach in the case of *Sutherland v. the United Kingdom* (cited above). He also drew the Court's attention to the cases of *Wilde, Greenhalgh and Parry v. the United Kingdom* (no. 22382/93, Commission decision of 19 January 1995 [striking out], unreported) and *Smith and Grady v. the United Kingdom* (nos. 33985/96 and 33986/96, § 58, ECHR 1999-VI respectively). He emphasised that the prosecution was discontinued, not out of respect for the Convention, but because the complainant declined to testify. He noted that many other people have been convicted of the offence for which he was prosecuted and have served prison sentences. The applicant recalled that the matter only came to the attention of the police because he reported being attacked by the complainant and he observes that, instead of being protected by the State, he

was prosecuted in violation of the Convention. He also criticised the conduct of the proceedings. For instance, he suspected that the CPS deliberately told him that he was not required to attend a hearing at the Magistrates' Court so that they could request the court to proceed with his committal for trial and he further claims that the CPS deliberately delayed in informing him that the complainant had decided not to testify.

22. The Government conceded that, on the facts of this application, the existence of, and prosecution of the applicant under, legislation providing for different ages of consent for homosexual and heterosexual activities constituted a violation of Article 14 taken together with Article 8 of the Convention. The Government recognised that it was regrettable that there was a policy of maintaining different ages of consent according to sexual orientation. The Government reminded the Court that the age of consent for homosexual and heterosexual activities had been equalised since 2001 and that they were now engaged in a comprehensive review of the law relating to sexual offences to ensure, *inter alia*, that legislation did not differentiate unnecessarily on the grounds of gender or sexual orientation. The Government further recalled that, although criminal proceedings were commenced against the present applicant, the CPS decided not to pursue the charges and he was formally acquitted.

B. The Court's assessment

1. Complaint of discrimination on the grounds of sexual orientation

23. The Court recalls that, in the case of *Sutherland v. the United Kingdom*, the Commission was of the opinion that the existence of legislation making it a criminal offence to engage in male homosexual activities unless both parties had consented and attained the age of 18 while the age of consent for heterosexual activities was set at 16 years of age violated Article 14 of the Convention taken in conjunction with Article 8 (*Sutherland v. the United Kingdom*, (striking out) [GC], no. 25186/94, 27 March 2001 and Commission's report of 1 July 1997, unpublished). The Court further recalls its finding of a violation of Article 14 taken in conjunction with Article 8 due to the existence of, and in one case the conviction of individuals under, legislation which criminalised homosexual activity with men of 14 to 18 years of age when no such criminal offence existed for heterosexual or lesbian relations (*S.L. v. Austria*, no. 45330/99, 9 January 2003 and *L. and V. v. Austria*, nos. 39392/98 and 39829/98, 9 January 2003).

24. The Court notes that, while domestic law has since been amended, the present applicant was prosecuted under legislation which made it a criminal offence to engage in homosexual activities with men under 18 years of age while the age of consent for heterosexual relations was fixed at

16 years of age. It further notes that the prosecution did not proceed with the case to trial and that the applicant was subsequently formally acquitted of the charges against him. The Government's concession outlined at paragraph 22 above is also noted. However, the Court considers that the circumstances of the present case are such that it should examine the applicant's complaints (*S.B.C. v. the United Kingdom*, no. 39360/98, §§ 19 and 20, 19 June 2001, unreported).

25. The Court sees no reason to reach a conclusion different to those reached in the cases of *S.L. v. Austria* and *L. and V. v. Austria* (cited above). It therefore finds that the existence of, and the applicant's prosecution under, the legislation applicable at the relevant time constituted a violation of Article 14 taken in conjunction with Article 8 of the Convention.

2. Complaint of discrimination on the grounds of age

26. In light of its finding of a violation of Article 14 of the Convention in conjunction with Article 8 on the basis of discrimination on the grounds of sexual orientation, the Court does not consider it necessary also to consider the applicant's complaint of discrimination on the grounds of age.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

27. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

28. The applicant made detailed submissions on just satisfaction. He claimed 2400 pounds sterling ("GBP") in damages for the pecuniary loss he suffered as a result of his prosecution. The applicant submitted that he works as a freelance butler and was not able to work for 24 days as a result of attendance at police stations and court appearances and his inability to work on the day before and the evening of a court fixture due to distraction. He claimed that he could have earned GBP 100 per day.

29. The applicant further claimed 31,000 euros ("EUR") in damages for non-pecuniary loss. This was based on the sum of EUR 30,300 (plus inflation), considered by the applicant to be the highest award in the cases of military personnel discharged on the grounds of their homosexuality (awards of GBP 19,000 to each applicant in *Smith and Grady v. the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, 25 July 2000, ECHR 2000-IX, and *Lustig-Prean and Beckett* (just satisfaction), nos.

31417/96 and 32377/96, 25 July 2000, and awards of EUR 30,300 to each applicant in *Perkins and R. v. the United Kingdom*, nos. 43208/98 and 44875/98, 22 October 2002, and *Beck, Copp and Bazely v. the United Kingdom*, nos. 48535/99, 48536/99 and 48537/99, 22 October 2002)

30. The applicant claimed in respect of, *inter alia*, the psychological harm caused by his prosecution including the humiliation and anxiety he experienced, his fear of being sentenced to imprisonment and his concern about adverse media coverage and the resulting damage to his reputation. The applicant claims that his case was no better than that of *L. and V. v. Austria* (nos. 39392/98 and 39829/98, judgment of 9 January 2003) in which the applicants were convicted since the only reason his prosecution did not result in a conviction was because he ignored advice to plead guilty and wrote to the complainant asking him to withdraw his complaint. Therefore he should not receive any less in non-pecuniary damage than the applicants in that case who were awarded EUR 15,000. The applicant further noted that, in the case of *S.L. v. Austria*, the applicant was awarded EUR 5,000 simply due to the existence of similar discriminatory legislation although *S.L.* was never prosecuted. He also noted the award of GBP 10,000, following the finding of a violation of Article 8, to the applicant in *A.D.T. v. the United Kingdom*, who was convicted of gross indecency between men and received a conditional discharge. The applicant also cited the awards in the cases of *Aydın v. Turkey* and *B v. France* (*Aydın v. Turkey*, judgment of 25 September 1997, *Reports of Judgments and Decisions* 1997-VI, p. 50 and *B v. France*, judgment of 25 March 1992, Series A no. 232-C).

31. Finally the applicant claimed an increase of 50% as aggravated or punitive damages on the awards of pecuniary and non-pecuniary loss. He also requested the Court to make a number of consequential orders or award extra damages in their place. He submitted, *inter alia*, that the Court should order the Government to apologise to him, to offer reparation to all homosexuals and to strengthen the domestic legislation incorporating the Convention.

32. The Government maintained that the Court should not make any award for pecuniary damage since the applicant had produced no evidence to show that it was likely that he would have obtained work or would have been paid the figures he quotes. With respect to non-pecuniary damage, the Government emphasised the fact that the criminal proceedings against the applicant had been discontinued and that he had been neither convicted nor sentenced. The Government submitted that a finding of a violation of the Convention would constitute sufficient just satisfaction. Were the Court to make any award in respect of non-pecuniary damage, it should, in the Government's view, be no more than GBP 2000. The Government noted that several of the cases cited by the applicant were considerably more serious than his own. In the cases of *L. and V. v. Austria* and *A.D.T. v. the*

United Kingdom (cited above), the applicants were subject to criminal proceedings and had been convicted and sentenced. In *S.L. v.* Austria the applicant was hampered in his sexual development and suffered feelings of distress and humiliation throughout his adolescence. The comparison with the cases of discharged military personnel was, according to the Government, misplaced: in those cases, the applicants had been deprived of their careers in which they excelled, in which they were destined for further promotion and from which they derived considerable job satisfaction. The remaining cases cited by the applicant were materially different from his case, involving the rape of the applicant by a State official while in police custody (*Aydın v. Turkey*, cited above) and the failure of the State to register the applicant transsexual as a woman thereby preventing her from marrying (*B v. France*, cited above). The Government further submitted that the Court has no jurisdiction to make consequential orders in the form of directions or recommendations to Contracting States and that therefore, the applicant's remaining claims should not be allowed.

33. As regards the applicant's claim for pecuniary loss, the Court recalls that its case-law establishes that there must be a clear causal connection between the violation of the Convention established and the damage claimed by the applicant (for example, *Barberà, Messegué and Jabardo v. Spain*, judgment of 13 June 1994 (Article 50), Series A no. 285-C, §§ 16-20). The Court observes that the applicant works on a freelance basis and has not presented any evidence to show that he had been offered work which he then rejected or that it was likely that he would have obtained work or to substantiate the sums he claims he would have earned. In these circumstances, no award is made in respect of pecuniary damage.

34. Turning to the applicant's claim for non-pecuniary damage, the Court initially observes that, in a number of cases concerning the maintenance in force of legislation penalising homosexual acts between consenting adults, it considered that the finding of a violation in itself constituted sufficient just satisfaction for any non-pecuniary damage suffered (see the *Dudgeon v. the United Kingdom* judgment (just satisfaction) of 24 February 1983, Series A no. 59, pp. 7-8, § 14; the *Norris v. Ireland* judgment of 26 October 1988, Series A no. 142, pp. 21-22, § 50; and the *Modinos v. Cyprus* judgment of 22 April 1993, Series A no. 259, p. 12, § 30). However, the Court notes that in the more recent case of *S.L. v. Austria*, the Court awarded EUR 5000 where the existence of the discriminatory legislation meant that the applicant was prevented from entering into sexual relations with men until the age of eighteen. Awards for non-pecuniary damage were also made in cases where discriminatory legislation resulted in the prosecution of the applicants. However, the Court notes that the two cases cited by the applicant in which the Court made awards of EUR 15,000 and GBP 10,000 involved not only the prosecution, but also the conviction of the applicants and the imposition of a sentence, in

the former case a suspended sentence of imprisonment and in the latter a conditional discharge, following a trial in which details of the applicants' most intimate private life were laid open in public (respectively *L. and V. v. Austria* and *A.D.T. v. the United Kingdom*, both cited above). The Court further notes that in the cases involving the discharge of military personal on account of their homosexuality, the investigations carried out were of an exceptionally intrusive character, the discharge had a profound effect on the careers and prospects of the applicants and the policy was of an absolute and general nature so that the applicants were discharged due to an innate personal characteristic irrespective of their conduct or service records (*Smith and Grady v. the United Kingdom* (just satisfaction), *Lustig-Prean and Beckett* (just satisfaction), *Perkins and R. v. the United Kingdom* and *Beck, Copp and Bazely v. the United Kingdom*, all cited above). Finally the Court considers that the facts and violations in the cases of *Aydın v. Turkey* and *B v. France* are sufficiently different as not to be of any real relevance.

35. The Court notes that, in the present case, the applicant was prosecuted under the relevant legislation found to be in violation of the Convention. He was also committed for trial. While the CPS later discontinued the case before trial and the applicant was formally acquitted of all charges, the Court recognises the anxiety and distress that the prosecution must have caused the applicant. Making an assessment on an equitable basis, the Court awards the applicant EUR 7000 to be converted to pounds sterling at the date of settlement.

36. The Court recalls that it does not award aggravated or punitive damages (for example, *Cable and Others v. the United Kingdom* [GC] nos. 24436/94 etc., § 30, 18 February 1999, unreported).

37. The Court further recalls that it cannot make orders of the type requested by the applicant in paragraph 31 (for example, *Papamichalopoulos and Others v. Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B, § 34, *Akdivar and Others v. Turkey* (Article 50), judgment of 1 April 1998, *Reports* 1998-II, § 125 and *Finucane v. the United Kingdom*, no. 29178/95, §§ 88-90, 1 July 2003).

B. Costs and expenses

38. The applicant claimed EUR 10,000 for his legal work: EUR 5000 in relation to the domestic criminal and judicial review proceedings and EUR 5000 in relation to the Convention proceedings. He further claimed GBP 800 including interest for various expenses: GBP 200 for an initial consultation with solicitors about the criminal proceedings, GBP 70 for the fee paid for his judicial review application, GBP 247.67 for transcripts and other documents relating to the domestic proceedings, GBP 100 for photocopying, GBP 100 for telephone, facsimile and internet costs, GBP 20 for postage and GBP 50 for bicycle trips to the law library. The applicant

also claimed an increase of 50% of these amounts as aggravated or punitive damages.

39. The Government submitted that the applicant is not entitled to claim costs for the time he spent on his application nor the costs of bike journeys since they were not costs actually and necessarily incurred. As to the remaining items, the Government maintained that the Court should award no more than GBP 400 to 500 on the grounds, *inter alia*, that the applicant failed to produce any evidence to support his claims and abandoned his claim for costs in the domestic criminal proceedings.

40. The Court recalls that it will award legal costs and expenses only if satisfied that these were actually and necessarily incurred and reasonable as to quantum.

The sum claimed by the applicant in respect of the time spent by him preparing his submissions for the domestic and Convention proceedings cannot be taken into consideration since the applicant presented his own case (*Brincat v. Italy*, judgment of 26 November 1992, Series A no. 249-A, § 29). As to the costs of the domestic proceedings, the Court notes that the applicant was invited to make a claim for costs following his acquittal but decided not to pursue his claim. In these circumstances, the Court does not find it appropriate to make any award in respect of these costs. However, it is clear that the applicant did incur costs in obtaining documents for his case before this Court and various other expenses including photocopying, facsimile transmissions and postage. Taking into account all of these circumstances, the Court awards the applicant EUR 600 in respect of his costs and expenses to be converted into pounds sterling at the date of settlement.

C. Default interest

41. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 14 in conjunction with Article 8 of the Convention;

2. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the sums of EUR 7000

(seven-thousand euros) in respect of non-pecuniary damage and EUR 600 (six-hundred euros) in respect of costs and expenses, these sums to be converted into pounds sterling at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 February 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Matti PELLONPÄÄ
President